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Supreme Court, U.S.
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No. 06-288

IN THE

Supreme Court of the United States

JO-ANN CROSSLEY,
Petitioner,

v.

HERMAN FERRÉ-ROIG,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the Commonwealth of Puerto Rico

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a state court in determining the ownership of certain shares in a publicly traded corporation, may disregard the information provided in a in a proxy statement that Respondent filed with the Securities and Exchange Commission pursuant to 15 U.S.C. § 78 *et seq.*, as to Respondent, his wife (Petitioner) and their children having a "beneficial interest" in said shares, when the Petitioner had previously stipulated that Respondent was the sole owner of the shares in question.

Whether Respondent, pursuant to the information provided to the SEC in the aforementioned proxy statement, is estopped from claiming a sole interest of said shares in a litigation to liquidate the community property assets with Petitioner.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to these proceedings are Petitioner Jo-Ann Crossley (Plaintiff in the courts below) and Respondent Herman Ferré-Roig (Defendant in the courts below). As set forth by the Petitioner, the parties are natural persons.

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BRIEF IN OPPOSITION

JURISDICTION

The Petitioner Jo-Ann Crossley has improperly invoked the jurisdiction of this Honorable Court under 28 U.S.C. § 1258. As set forth by the Petitioner's own *Concise Statement of the Basis for Jurisdiction*, on page 4 of the *Petition for Writ of Certiorari*, there was no decision of a Federal Court of Appeals issued; only a denial of *certiorari* by the Supreme Court of the Commonwealth of Puerto Rico from a *Judgment* by the Puerto Rico Court of Appeals that involved only non-constitutional findings of fact under Commonwealth (state) laws regarding the liquidation of assets after the parties' divorce.

COUNTERSTATEMENT OF THE CASE AND PROCEEDINGS BELOW

The marriage between the Petitioner Jo-Ann Crossley (hereinafter "Petitioner" or "Crossley") and Respondent Herman Ferré-Roig (hereinafter "Respondent or "Ferré-Roig"), was dissolved through a divorce decree on September 23, 1999. On October 22, 1999 Crossley filed litigation in the Court of First Instance, Carolina Part, to liquidate any community property assets with Ferré-Roig. The main assets in contention are the shares of capital of a publicly owned company, Puerto Rican Cement, held by B.R.I.M. Incoporated, a corporation of which Ferré-Roig is sole shareholder.

The case followed a protracted course and on July 1, 2003 Ferré-Roig filed a motion for partial summary judgment or to dismiss as to Crossley's demands over B.R.I.M.'s assets. Ferré-Roig requested the entry of summary judgment and/or dismissal, since it was uncontroverted that the shares of capital in Puerto Rican Cement were not community property.

Crossley countered Ferré-Roig by arguing that he was estopped from claiming sole ownership of the shares because doing so would go against his own actions. To wit: (a) Ferré-Roig had allegedly claimed in unrelated litigation between the Ferré family, that the shares in question were a community property of the parties; (b) that regarding the Puerto Rican Cement shares, Ferré-Roig submitted information in a proxy statement filed with the SEC, wherein he allegedly stated that Crossley was a co-shareholder with him of said shares.

On November 24, 2004 the parties filed before the Court an *Amended Joint Pretrial Conference Report* which included several crucial stipulations that established without a doubt the exclusive ownership of the Puerto Rican Cement shares by B.R.I.M.

On November 26, 2003 the Court of First Instance, Carolina Part issued a *Resolution* and *Partial Judgment*, wherein it was determined that the Puerto Rican Cement shares in the tenancy of B.R.I.M. were from its original acquisition and through subsequent transactions, exclusive patrimony of Ferré-Roig. The Court reached this determination through the unaffected title and/or through his corporation (in which Ferré-Roig is the sole owner), as well as the parties' stipulations to that effect in the *Amended Joint Pretrial Conference Report*.

The day before the bench trial on the remaining issues, on May 13, 2004 Crossley filed a *Motion to Enter Judgment*, wherein the parties agreed that the only pending matters were related to the distribution of the stipulated assets, albeit exclusive or community property in nature and that the Court could make a final decision as to the liquidation of the community property taking in consideration the documental evidence and the stipulations set forth in the *Amended Joint Pretrial Conference Report*. Also, in said *Motion to Enter Judgment*, the record was further clarified as to the stipulated fact that the shares of B.R.I.M. were an exclusive patrimony of Ferré-Roig. Several other motions were filed regarding the parties' remaining assets. Notwithstanding, Crossley reserved her right to appeal the Court's determination as to the exclusive nature of the Puerto Rican Cement shares in the tenancy of B.R.I.M.

On February 16, 2005 the Court of First Instance, Carolina Part issued its final *Judgment*, incorporated the parties' agreements, divided the community property and after examining the documentation submitted by Crossley as to the purported estoppel, reiterated its determination that the Puerto Rican Cement shares in the tenancy of B.R.I.M. were the exclusive property of Ferré-Roig. The Court expressly found that **none** of the documents submitted by Crossley (pleadings in the Ferré litigation and the proxy statement filed with the SEC),

supported the Petitioner's claim of community property as to the shares.

Crossley timely filed her appeal before the Puerto Rico Court of Appeals, Carolina Region. On October 19, 2005 and after considering Petitioner's claims of error, including the estoppel defense, said Court affirmed the *Judgment* by the Court of First Instance, Carolina Part. The Court also expressly found that the evidence in the instant case overwhelmingly established that the shares in controversy are of the exclusive ownership/patrimony of Ferré-Roig and that Crossley did not submit **any** evidence that controverted the exclusive, private nature of said asset. The Court further found that Respondent was not barred from negating the community nature of the shares and that nothing in the record evidenced any acceptance or acquiescence from Ferré-Roig's part. The Court not only examined the submitted documentation, to wit: pleadings in the litigation between the Ferré family and the proxy statement filed with the SEC; but also found that Crossley was bound by her stipulations in the *Amended Joint Pretrial Conference Report.*

The Commonwealth of Puerto Rico's Supreme Court denied Crossley's petition for *certiorari* on March 7, 2006 as well as two motions for reconsideration. The final *Resolution* was issued by the Supreme Court on May 15, 2006.

REASONS FOR DENYING THE PETITION

28 U.S.C. § 1258 allows review by the United States Supreme Court of final judgments or decrees by the Supreme Court of the Commonwealth of Puerto Rico where the validity of a treaty or statute of the United States is drawn in question or where the validity of a Puerto Rico statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where a right or privilege is specially set up or claimed under the Constitution, treaties or statutes of the United States.

Review of this case should be denied because no constitutional issue is presented. The petition for review is a thinly veiled and disingenuous attempt to convince the United States Supreme Court that it should review a factual determination made in a trial court in the Commonwealth of Puerto Rico regarding the liquidation of assets after a divorce. The Puerto Rico Supreme Court refused to do so. This Honorable Court should do so as well.

The Petitioner does not actually claim a violation of any federal or state constitutional right. Her argument is that the trial court disregarded what she contends is evidence of an acknowledgement by Respondent that shares of exclusive and private nature became community property through a proxy statement filed with the SEC.

The problem for Petitioner not only lies in the fact that the state courts, (trial and appeals) did consider the aforementioned proxy statement filed with the SEC and expressly found that its content did not support Crossley's allegation that Ferré-Roig admitted that she became co-shareholder of the Puerto Rican Cement shares. But also, the "smoking gun" evidence submitted by Crossley was clearly lacking since in the Proxy Statement filed by the Respondent with the SEC at a time when he was still married to the Petitioner, it was merely stated that Respondent, Petitioner and their children had a **beneficial interest** in the Puerto Rican Cement shares. This statement cannot be construed as false or even misleading, since under Puerto Rico law, in the absence of a prenuptial agreement voiding the same, the dividends/earnings of exclusive shares benefit the spouse (and dependents) during the duration of the marriage. See Article 1301 of the Puerto Rico Civil Code, 31 P.R. Laws Ann. § 3641(3) ("To the conjugal partnership belong . . . (3) [t]he fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses").

In fact, as the Puerto Rico Courts explained in the instant case, the Petitioner's claim of community property would also fail even if Respondent had intended (which he clearly did not and expressly denied as such) for Crossley to become co-shareholder of the Puerto Rican Cement's shares; because under Puerto Rico law said action would constitute a donation between spouses, an act deemed null and void in the Commonwealth of Puerto Rico, proscribed by Article 1286 of the Puerto Rico Civil Code, 31 P.R. Laws Ann. § 3588 and Supreme Court jurisprudence. See also, *Delgado v. Monroig*, 57 D.P.R. 474 (1970).

Furthermore, contrary to the Petitioner's contention, this case does not involve any SEC statute or regulation, whereupon Crossley could ground her cause of action.

First, the information included in the proxy statement was not even misleading or even material to third party investors who could in good faith rely on the same.

Section 11(a) imposes liability when a registration statement contains "an untrue statement of a *material* fact or omit[s] to state a *material* fact required to be stated therein or necessary to make the statements therein not misleading." (italics added). 15 U.S.C. § 77k. This Honorable Court decided in *TSC Indus., Inc. v. Northway, Inc.* 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976), that an omitted fact is material "if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*

As discussed *ante*, the proxy statement filed by Ferré-Roig with the SEC as to the Petitioner having a "beneficial interest" in his private shares, cannot be construed as false or even misleading, since under Puerto Rico law, the dividends/ earnings of said exclusive shares benefit the spouse (and dependents) during the duration of the marriage.

Second, the right to sue (standing) is limited only to persons who purchase securities that are the direct subject of the registration statement and are traceable to such offering. Section 11 of the 1933 Act, 15 U.S.C. § 78k, provides an express remedy for persons who purchased securities that were issued pursuant to a registration statement affected by material misrepresentations or omissions. Section 11's overriding purpose is "to assure compliance with the disclosure provisions of the 1933 Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering. *Id.* See also *Herman & MacLean v. Huddleston,* 459 U.S. 375, 381-82, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983); *Verysyss, Inc. v. Coopers & Lybrand*, 982 F.2d 653, (1st Cir. 1992). It accomplishes this by holding issuers strictly liable with respect to the accuracy of the registration statement, and imposing on others a duty of—"reasonable investigation," and a standard of "reasonable grounds to believe" that the registration statement is accurate. 15 U.S.C. § 77k.

Even assuming *arguendo,* that the information included in the proxy statement was either misleading or material, it is clear that Crossley lacks any standing to benefit from such a remedy.[1] In fact, Section 11 does not even provide relief to purchasers of securities that entered the public market by some means other than the specific registration statement challenged. *See, e.g., Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003); *Barnes v. Osofsky*, 373 F.2d 269, 271-73 (2d Cir. 1967). See also, *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 977 (8th Cir. 2002).

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[1] The entire foundation upon which the Petition is grounded—whether a proxy statement filed with the SEC grants proprietary rights to Petitioner—is not only flawed and contested, but also, the SEC provisions to wit 15 U.S.C. § 78 0 and ff, cited by Petitioner are inapplicable to the case at bar.

As such, review of these findings by the United States Supreme Court is not warranted. No constitutional issues are presented. The Petitioner is attempting to review ruling of an adverse factual determination in the trial Court of the Commonwealth of Puerto Rico. That does not provide a valid basis for review under 28 U.S.C. § 1258.

Respectfully submitted,

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